

Zantidis (Migration) [2022] AATA 2950 (2 March 2022)

1.

2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Dimitrios Zantidis
VISA APPLICANT:	Mrs Yan Si
REPRESENTATIVE:	Mr Dominic Cookman (MARN:1789257)
CASE NUMBER:	1924431
HOME AFFAIRS REFERENCE:	BCC2017/3416876
MEMBER:	Rosa Gagliardi
DATE:	2 March 2022
PLACE OF DECISION:	Australian Capital Territory
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa: • Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations.

3.

Statement made on 2 March 2022 at 10:15am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – false or misleading information – two prior marriages – bogus document – marriage certificate – not purposefully untrue – no material benefit – complaints made to the Tribunal – adverse information – decision under review remitted

4.

LEGISLATION

Migration Act 1958 (Cth), ss 65, 349, 359AA

Migration Regulations 1994 (Cth), Schedule 2, cl 309.225; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 26 July 2019 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicant applied for the visa on 19 September 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl cl.309.225 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) it was considered that there was evidence that the applicant had given the Department misleading information that is false and misleading in relation to the application for the visa under review.
7. The review applicant appeared before the Tribunal on 18 February 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant in China by telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
8. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The government website of Births, Deaths and Marriages Registration of the Office of New South Wales, indicates that in the case of a marriage, if either party has been previously married, evidence of the termination must be provided in the form of a divorce certificate (if divorced) or a full death certificate (if widowed). Certificates in a foreign language must be officially translated, at the time of intended marriage.
16. In submitting a marriage certificate indicating the applicant was married to her sponsor, Mr Zanitidis in Australia, on 15 October 2016, the applicant declared her conjugal status as 'Never Validly Married', contrary to the information she had provided in the application itself in which the applicant had declared she had had two previous marriages.
17. The correct information is, however, that the applicant first entered Australia on a subclass 600 visa in March 2014 and declared two prior marriages. The first was to Mr Tian Hongwen from September 1999 to March 2005. The couple divorced and there were no children from the marriage. The applicant's second marriage was to Mr Sun Haiwang from February 2013 to June 2013. This information was provided to the Department of Home Affairs in the application.
18. The Department not unreasonably came to the conclusion that false or misleading information had been provided to obtain a false or bogus document, the marriage certificate.
19. It was argued strongly at hearing that the error in the marriage certificate was a result of an honest mistake and misunderstanding such that the false or misleading information was not purposefully untrue. It has been submitted that such a misunderstanding occurred on 3 September 2016, when the applicant and her sponsor, Mr Zantidis, met the marriage celebrant, ahead of their marriage ceremony on 15 October 2016. They had phoned Ms Chang in advance to discuss the logistics of the marriage. It is claimed that the chosen celebrant, Ms Chang, was overseas at the time but that her husband, Mr Peter Chang who is also an authorised celebrant, was at home at the time. The parties agreed to meet

Mr Chang at his home on 3 September 2016. Mr Chang at the appointed time then took the applicant and Mr Zantidis to the venue where the marriage was to take place and they held some discussions around number of guests and the type of flowers they would like at the ceremony, for example.

20. It is claimed that Mr Chang then asked the parties "*Has either of you been married before?*", to which Mr Zantidis queried, "*You mean in Australia?*" and it is purported that Mr Chang responded, "*Yes, in Australia*". It is alleged that Mr Zantidis then stated "*No, none of us has been married before in Australia*".
21. Further, it is claimed that Mr Zantidis then filled in the Notice of Intended Marriage and they both signed it. It is argued, moreover, that the applicant's English was limited and she did not actively participate in the conversation with Mr Chang about whether she had been married before and did not fill in the form.
22. The Tribunal notes that the applicant had declared her previous marriages in her application for this visa. The Tribunal also notes that the parties then went to the Births, Deaths and Marriages office in NSW to correct the error to indicate that the applicant had in fact been divorced, although the Tribunal is not convinced that of itself retrospectively correcting false or misleading information cancels out the fraudulent nature of that information.
23. The Tribunal has also considered what the applicant and Mr Zantidis might have had to gain by purposefully providing false and misleading information by omitting that the applicant had been married previously, given the applicant had in her application stated she was twice divorced. The Tribunal is unable to discern any material benefit in respect of the application overall, or in the consideration of whether or not the parties are in a genuine and continuing spousal relationship as set out under Regulation 1.15A.
24. The Tribunal also leans towards accepting Mr Zantidis' explanation about the misunderstanding because at hearing it was evident that he took on the responsibility for having taken the marriage celebrant's information at face value without being more inquisitive. The Tribunal accepts that Mr Zantidis as the sponsor took full responsibility for the error and blamed himself that he and his wife were now apart.
25. The Tribunal notes from the probative evidence submitted, that Mr Zantidis suffers from serious mental health problems and this may also have played a part in his accepting unquestioningly the directions of the marriage celebrant. In the hearing it was evident that Mr Zantidis is a reliable witness and is not minded to mislead Australia's immigration authorities.
26. Having assessed the evidence overall the Tribunal is satisfied that the applicant and Mr Zantidis were the victims of someone in a position of authority who had misled the parties, and in that sense the Tribunal finds that the information in the marriage certificate was not purposefully untrue. In this case the Tribunal cannot identify an element of fraud or deception by any person, even if there may have been incompetence by a marriage celebrant.
27. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

28. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
29. The Tribunal is not aware that this is the case and therefore PIC 4020(2) does not apply.

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

30. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
31. The Department has not raised this matter as an issue and the Tribunal does not have evidence that the applicant or any family member have been refused a visa because of a failure to satisfy the identity requirements. The Tribunal notes that there were some discrepancies relating to the applicant's date of birth but overall, her identity does not seem to be an issue. Therefore PIC 4020(2B) does not apply.

32. *Conclusion*

33. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.309.225.

34. *Postscript*

35. **NOTE TO DEPARTMENT:**

36. As observed at hearing by the Tribunal this matter has had a lengthy gestation and the parties have now been married for over 5 years. The sponsor, Mr Zantidis suffers from serious mental health issues and the separation from the applicant appears according to the medical evidence to have aggravated his illness. An expedited review by the Department in respect of whether or not the applicant meets cl.309.211 and cl.309.221 would therefore alleviate the anxiety being experienced by Mr Zantidis.

37. **COMMENTS BY THE MIGRATION AGENT**

38. On 28 February 2022 the migration agent wrote to the Acting President of the Tribunal and the Tribunal's comments on the matters raised by no way anticipate any official response to the complaints.
39. Firstly, it is claimed that the issue of the adverse information relating to text messages sent by the parties to each other had never been ventilated before and that it was of concern that "the Tribunal held this evidentiary material". The Tribunal notes that the applicant could have sought information from her Departmental or Tribunal files at any time under the Freedom of Information Act, for example. The Tribunal considers that it was fulfilling its statutory obligations by ensuring the parties were aware that the Tribunal had seen information that might have been adverse if the Tribunal relied on it. Ultimately, as the Tribunal has not relied on this information because it has found that no false information had been provided, it is

only relevant to the parties in respect of the Departmental assessment of whether the parties are in a genuine and continuing spousal relationship.

40. The Tribunal asked whether Mr Zantidis did wish to have a break to consider the gist of the information put to him under s.359AA of the Migration Act, but on one occasion declined a break, and on another had a break to discuss adverse material with the migration agent. The Tribunal followed the statutory obligations in terms of stating why the material was relevant and how the Tribunal might use it.
41. The Tribunal did not state that a fresh application would need to be made by the parties if they were successful in meeting cl.309.225. The Tribunal simply indicated to the parties that it would not be making a decision in relation to cl.309.211 and cl.309.221 which go to whether the relationship is genuine and continuing because it considered that this is another major inquiry that should be undertaken at primary review and deserves appropriate scrutiny. As pointed out in the letter by the migration agent, under s.349 the Tribunal *may* affirm/set aside/ or vary a decision, and the Tribunal emphasises this is whether or not the Department of Home Affairs has had an opportunity to make findings in relation to each of the clauses of the Regulations. In this case, however, the Tribunal has considered it appropriate to confine its findings to whether the applicant meets cl.309.225.

DECISION

42. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
 - Public Interest Criterion 4020 for the purposes of cl cl.309.225 of Schedule 2 to the Regulations

Rosa Gagliardi
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...